No. [illegible]

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1960

JESSE TURNER,
Appellant

vs.

CITY OF MEMPHIS, et al,
Appellees.

Appeal from the United States District Court for the Western District of Tennessee, Western Division

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MOTION TO DISMISS

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CASES CITED

Harrison v. NAACP, 360 U.S., 167, 79 S. Ct., 1025

Williams v. Dalton, 231 F. 2d, 646 (1956)

STATUTE

Tennessee Code Annotated, Vol. II, Sec. 62-710.

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MOTION TO DISMISS

The appellees, pursuant to United States Supreme Court Rule 16, file this motion to dismiss on the ground that the appeal does not properly lie to this Honorable Court at this time.

Opinion Below

The Opinion of the District Court has not yet been reported but a true copy thereof appears as Appendix "A" to the Statement as to Jurisdiction filed herein by the appellant.

Jurisdiction

Appellees concede that this Court would acquire jurisdiction in this cause after the statutes involved have been authoritatively construed by the State Courts.

Statute Involved

Section 710, Title 62, Tennessee Code Annotated, which section is set forth on Page 6 of appellant's Jurisdictional Statement.

Question Presented

The question presented is whether the action of the Three Judge District Court was correct in its application of the doctrine of abstention with regard to State statutes which have not been authoritatively construed by the State Courts.

Statement of Facts

The complaint is predicated on the proposition that the plaintiff (appellant) was refused service by the Dobbs Houses Restaurant, Inc., except in a segregated section of restaurant facilities which said corporation operates at the Memphis Municipal Airport in a space under lease from the City of Memphis. The implication of the allegations of said complaint is that the plaintiff at the time of the suit and in the future will be deprived of his civil rights.

It should be pointed out that the restroom facilities at the Memphis Municipal Airport are not now segregated.

Argument

As has been stated above the restroom facilities at the Memphis Municipal Airport are not now segregated, thus the City of Memphis as lessor of the defendant (appellee) Dobbs Houses, Inc., must of necessity rely on the interpretation of the statute set forth in defendant Dobbs Houses amendment to its answer, which is T.C.A. 62-710.

This Court should, under the principle of abstention, extend to the Tennessee Courts the opportunity to say what its views may be with respect to said statutes and in the light of the late decisions of the Supreme Court of the United States.

On June 8, 1959, this Honorable Court decided *Harrison v. NAACP,* 360 U.S. 167, 79 S.Ct. 1025, announcing the

principle of abstention in all of the current segregation litigations. It was a six to three decision. All arguments pro and con for this principle of abstention in the segregation litigation were made by the majority and the minority. Nothing more can be said pro or con as all has been clearly set forth in this decision.

The application of the principle is therefore the firm law and is not in any sense optional, elective or discretionary, but binds all of us.

Tennessee has, of course, a Declaratory Judgment Statute. Tennessee Courts are open to the plaintiff. The plaintiff should be required to file his action in the State Court for an interpretation of the statute in question and in the meantime, this action should be stayed until determination of the state litigation. On appropriate appeal from the State Court this Court can then determine if it is necessary for it to take any further action to fully protect and enforce the plaintiff's constitutional rights. This procedure is in substance the holding of this Court in the Harrison case.

Judge Harlan wrote the majority opinion. Judge Douglas wrote the minority opinion in which Judges Warren and Brennan concurred. The majority opinion states the case and the legal conclusion in the quotations which follow:

> "In this case a three-judge District Court was convened pursuant to 28 U.S.C. Sec. 2281, 28 U.S.C.A. Sec. 2281, to hear federal constitutional challenges against five Virginia statutes. It declared three invalid under the Fourteenth Amendment, and permanently enjoined the appellants from enforcing them against the appellees; the other two statutes it found vague and ambiguous and accordingly retained jurisdiction pending a construction by the state courts. 159

F. Supp. 503. Only the former disposition was appealed. The appeal raises two questions: First, whether in the circumstances of this case the District Court should have abstained from a constitutional adjudication, retaining the cause while the parties, through appropriate proceedings, afforded the Virginia courts an opportunity to construe the three statutes in light of state and federal constitutional requirements. Second, if such an abstention was not called for, whether the District Court's constitutional holdings were correct. Because of our views upon the first question we do not reach the second.

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"The Attorney General and his codefendants moved to dismiss the action on the ground, among others, that the District Court should not 'exercise its jurisdiction to enjoin the enforcement of state statutes which have not been authoritatively construed by the state courts.' The District Court, recognizing 'the necessity of maintaining the delicate balance between state and federal courts under the concept of separate sovereigns.' stated that 'the constitutionality of state statutes requiring special competence in the interpretation of local law should not be determined by federal courts in advance of a reasonable opportunity afforded the parties to seek an adjudication by the state court,' but considered that relief should be granted where 'the statute is free from ambiguity and there remains no reasonable interpretation which will render it constitutional ***.' 159 F. Supp. at pages 522, 523. On this basis, the court, one judge dissenting, held Chapters 31, 32 and 35 unconstitutional, and permanently enjoined their enforcement against NAACP and Fund.

Chapters 33 and 36, on the other hand, the Court unanimously found vague and ambiguous. It accordingly retained jurisdiction as to those Chapters, without reaching their constitutionality, allowing the complaining parties a reasonable time within which to obtain a state interpretation.

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"These constitutional holdings were made in the context of findings that Chapters 31, 32 and 35, as well as Chapters 33 and 36 not presently before us, were passed by the Virginia Legislature 'to nullify as far as possible the effect of the decision of the Supreme Court in Brown v. Board of Education, 347 U.S. 483 (74 S. Ct. 686, 98 L. Ed. 873) * * as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees.' 159 F. Supp. at pages 511, 515. In the view we take of this case we do not reach appellants' objections to these findings.

"According every consideration to the opinion of the majority below, we are nevertheless of the view that the District Court should have abstained from deciding the merits of the issues tendered it, so as to afford the Virginia courts a reasonable opportunity to construe the three statutes in question. In other words, we think that the District Court in dealing with Chapters 31, 32 and 35 should have followed the same course that it did with respect to Chapters 33 and 36.

"This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal

courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments * * * should, at all times actuate the federal courts,' Matthews v. Rodgers, 284 U.S. 521, 525, 52 S. Ct. 217, 219, 76 L. Ed. 447, as their 'contribution * * * in furthering the harmonious relation between state and federal authority * * *.' Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 501, 61 S. Ct. 643, 645, 85 L. Ed. 971. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them.

* * * * * * *

"This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. See City of Chicago v. Fielderest Dairies, Inc., supra, 316 U.S. at pages 172-173, 62 S. Ct. at page 988.

"The present case, in our view, is one which calls for the application of this principle, since we are unable to agree that the terms of these three statutes leave no reasonable room for a construction by the Virginia courts which might avoid in whole or in part the

necessity for federal constitutional adjudication, or at least materially change the nature of the problem."

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"All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court. The Virginia declaratory judgment procedure, 2 Va. Code, 1950 Sec. 8-578 to 8-585, which the appellees are now pursuing with reference to Chapters 33 and 36, also provides an expeditious avenue here. And of course, we shall not assume that the Virginia courts will not do their full duty in judging these statutes in light of state and federal constitutional requirements.

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"Accordingly, the judgment below will be vacated and the case remanded to the District Court, with instructions to afford the appellees a reasonable opportunity to bring appropriate proceedings in the Virginia courts, meanwhile retaining its own jurisdiction of the case, and for further proceedings consistent with this opinion."

In Williams v. Dalton, 231 F. 2d 646 (1956), the sixth circuit declined to entertain jurisdiction for declaratory relief under the Civil Rights Act. Judge Potter Stewart, now of the Supreme Court, stated on behalf of the Sixth Circuit:

> "It is well settled, however, that accepted principles governing equitable and declaratory relief are no less applicable where such relief is sought under the Civil Rights Act . . . Federal Courts have been chary of granting the declaratory or equitable relief in an area of possible friction between Federal and State jurisdictions."

It is a sensible conclusion for the Federal Courts to say that the State Courts should be given the first opportunity to construe their statutes, and if such construction does not adequately protect constitutional rights, the offended citizen may then take his problem to the Federal Court, which will review the State action to determine if a fair measure of justice has been done.

There are many reasons to apply this principle of abstention to the case before this Court. It is, we believe a problem for the Supreme Court of Tennessee to first say what the statutes involved in this case mean. If the Tennessee Supreme Court seems to give eventually the wrong answers to these questions, this Court may then proceed with a review of the State decisions to adequately protect the plaintiff's constitutional rights.

On the basis of the Harrison case the three-judge District Court saw fit to apply the doctrine of abstention as set forth in their opinion as follows:

> "In Harrison v. NAACP, 360 U.S. 167, the United States Supreme Court, in speaking on the doctrine of abstention of federal courts to permit action by the state courts, stated on page 176: 'This now well-established procedure is aimed at the avoidance of un-

necessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a "Scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts, Matthews v. Rodgers, 284 U.S. 521, 525, as their contribution . . . in furthering the harmonious relation between state and federal authority . . ." Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 501. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. (Citing numerous cases). This principle does not of course, involve the abdiction of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication.'

"Thus, in the light of the Harrison case, with its clear enunciation of the doctrine of abstention in cases of this type, we hold that the plaintiff's cause herein shall be stayed pending the prosecution of a proper declaratory judgment suit to be brought by the plaintiff in the courts of Tennessee for the purpose of obtaining an interpretation of the state statutes, regulations and city ordinances under consideration herein."

CONCLUSION

It is, therefore, respectfully submitted that the appeal to this Court at this time is premature and should be dismissed.

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CERTIFICATE OF SERVICE

I, F. B. Gianotti, Jr., attorney herein and a member of the bar of the Supreme Court of the United States, do hereby certify that I have served upon counsel of record for the appellants and other appellees a copy of the foregoing motion to dismiss by depositing true and correct copies thereof in the United States mail, first class postage prepaid, on May 29, 1961, addressed as follows:

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